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No. 96-152

SUPREME COURT OF THE UNITED STATES
October Term, 1996

RUDOLPH W. GIULIANI,
as Mayor of the City of New York, et al.,

Petitioners,

- against -

HAROLD YOURMAN, et al., etc.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION

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THE VALIDITY OF EACH OF THE FIVE COMPONENTS OF THE SALARY BASIS TEST, EXCEPT THAT CONCERNING JURY DUTY, IS AT ISSUE HERE.

The validity of the jury duty component of the salary basis test is not at issue here because petitioner's policies concerning jury duty have at all times been consistent with the salary basis test. As to the other four components of the salary basis test (Petition at 8-9), petitioners contend that each is arbitrary and capricious and contrary to the intent of Congress. Therefore, petitioners contend, if this Court agrees with petitioners about any one of those components, the entire salary basis test should be struck down because the federal Department of Labor ("DOL") drafted the entire test as a unit and for a Court to strike a part of it, but leave the remainder as the salary basis test, would be for the Court to draft its own salary basis test. This was the reasoning employed by the Ninth Circuit Court of Appeals in Service Employees International Union v. County of San Diego, 60 F3d 1346, 1354 (9th Cir, 1995), cert. denied, ___ US ___, 116 S Ct 774 (1996) ("SEIU") (Petition at 21).

On the other hand, if this Court does not agree with petitioners and SEIU but believes that each of the other four components of the salary basis test must be addressed individually, i.e., if this Court believes that even if one or more components of the salary basis test are struck down, the remaining components constitute a valid salary basis test, then the validity of each of the components must be addressed. Contrary to the assertions in respondents' brief in opposition to the petition (RBO at 1-3), the validity of the salary basis test's prohibition on partial-day docking, before the adoption of section 541.5d, is an issue here. The limitations period in this action extends back to April 1, 1989 (JA 20, 1740-51). Section 541.5d became valid either in September 1991 or August 1992 (Petition at 11-12). The

Third and Ninth Circuit Courts of Appeals have found the prohibition on partial-day docking invalid. Balgowan v. State of New Jersey, slip op., No. 95-5276 (3d Cir, May 16, 1996), vacated on unstated grounds, 84 F3d 656 (3d Cir, 1996); SEIU, supra, 60 F3d at 1352-53. We are aware of no Court of Appeals that has found the salary basis test valid prior to its amendment by section 541.5d.

As to the court attendance as a witness component (Petition at 8), it is obvious from looking at the jury duty, court attendance as a witness, and temporary military leave components of the salary basis test that in drafting the salary basis test many years ago DOL observed that in the private sector paid leave for these purposes was in DOL's opinion a good indicator of whether an individual was employed in a "bona fide executive, administrative or professional capacity." 29 USC section 213(a)(1). Paid leave for these purposes would seem to be based on the notion that the private employer would pick up the tab, so to speak, when the employee performed these civic duties. This notion has no application to modern State and local governments which operate under the public accountability principle (Petition at 10).

As to the temporary military leave component, as with the court attendance as a witness component, this component has the potential, at least, to deny the managerial exemption to every State and local government that does not grant unlimited paid miliary leave. The District Court's entire analysis of this component was that petitioners' policies on temporary military leave, which consistent with state law permit up to 30 calendar days or 22 working days of paid leave per year, "presents the potential for employees on temporary military leave to take leave without pay" (A 18-19). We assume that the District Court's thinking was that if an employee had exhausted his or her paid military leave, was on unpaid military leave Monday through

worked on Thursday and Friday and thus was paid only for two days, rather than the entire week, there would be a "violation" of the salary basis test. This is an irrational means of determining whether someone is employed in a "bona fide executive, administrative or professional capacity" and this analysis deprives State and local governments of the managerial exemption. The other three District Courts in New York that have addressed this question have concluded that the temporary military leave component is irrational. Close v. State of New York, slip op., No. 94-CV-0906 (NDNY, February 13, 1996); Meringolo v. City of New York, 908 F Supp 160, 167-68 (SDNY, 1995); McCloskey v. Triborough Bridge & Tunnel Authority, 903 F Supp 558, 566-67 (SDNY, 1995). The irrationality of the temporary military leave component is all the greater because the overwhelming majority of employees are not members of the Reserves or National Guard. Yet, in the view of respondents and the lower Courts herein, because they could be "subject to" reductions in salary if they were and if the above possibility occurred, no employee of petitioners can come within the managerial exemption.

The irrationality of the disciplinary component was addressed in the Petition and we briefly address here a few of the points in respondents' brief in opposition. Respondents argue, on the actual deduction/theoretical possibility issue, that it makes no sense for the managerial exemption to be lost only for the disciplined employee, rather than the entire class of employees of which that employee is a member (RBO at 17). The alternative, of course, is that the exemption is lost for the entire class because one member of the class commits a disciplinary infraction and is disciplined in a manner inconsistent with the salary basis test, which of course is a windfall for the entire class that would not have occurred but for the employee's violation, such as accepting free sausage sandwiches (Petition at 35-36). If neither alternative makes sense, that is because each is based

on the disciplinary component of the salary basis test and the disciplinary component makes no sense.

THERE IS UNQUESTIONABLY A SPLIT IN THE COURTS OF APPEALS ON THE ACTUAL DEDUCTION/THEORETICAL POSSIBILITY ISSUE.

Respondents assert, "A close examination of the Courts of Appeals' decisions in this area reveal that there is more consensus and less of a conflict than might appear at first glance" (RBO at 10). This is hardly a denial that there is a conflict in the Circuits. And even taking respondents' view of the Courts of Appeals' decisions, there are four different approaches to this issue (RBO at 10-11). There should be national uniformity on this issue and it can only come from this Court.

THE FACT THAT CERTIORARI WAS GRANTED IN AUER PROVIDES NO REASON NOT TO GRANT CERTIORARI HERE.

Respondents argue that this Court should not delay denial of the petition here because of the pendency of Auer v. Robbins in this Court because in Auer there was only a single deduction, that deduction was not made pursuant to an established policy and there were "unique circumstances" while in the present case, according to respondents, there were numerous deductions, there is an established policy and there were no "unique circumstances" (RBO at 11-12).

In the first place, however, no one knows what this Court will say in its opinion in Auer or how the decision or opinion in Auer will affect this case. For this basic and incontrovertible reason, even if this Court is not inclined to grant this petition at this time, this Court should not deny the petition but rather should wait for the opinion in Auer. And more specifically, on the issues in Auer, the actual

deduction/theoretical possibility question and the window of correction, petitioners' arguments in the Second Circuit Court of Appeals were severely limited by that Court's precedent of Martin v. Malcolm Pirnie, Inc., 949 F2d 611 (2d Cir, 1991), cert. denied, 506 US 905 (1992), and if this Court's decision is contrary to that case it would be most unfair to petitioners not to have the benefit of a remand after Auer. Also, in presenting this case to the Court of Appeals, petitioners did not have the benefit the brief filed in this Court by the Solicitor General in Auer, in which DOL changed its official position 180 degrees and argued that Auer was correctly decided.

In addition, if this case is as different from Auer as respondents contend, that is a reason the writ should be granted here. Petitioners here argue that the salary basis test is arbitrary and capricious, irrational and contrary to the intent of Congress as applied to the public sector; it does not appear that this argument is raised by the City of St. Louis in Auer. Moreover, respondents here argue that there was no established policy in Auer but that there is one here. However, this only begs the question of what an established policy is. In Auer it certainly was the city's policy that disciplinary sanctions including fines and suspensions were possible for violation of the residency requirement. Auer v. Robbins, 65 F3d 702, 711 (8th Cir, 1995), petition for cert. granted, No. 95-897 (1996). Here, although disciplinary sanctions were possible for any number of violations, there was no requirement that charges be brought upon probable cause that a violation had occurred, nor was there any requirement of any specific sanction for any particular violation (JA 17-18). This Court should grant the petition in this case as well as in Auer if this Court believes that clarification of the term "established policy" is relevant.

Respondents' repeated assertions that petitioners are somehow misleading this Court are both wrong and

annoying. Respondents cite instances of disciplinary sanctions imposed on managers but fail to recognize that disciplinary sanctions not inconsistent with the salary basis test are irrelevant (RBO at 12 n.11). In any event, what this record indicates about disciplinary sanctions inconsistent or arguably inconsistent with the salary basis test is that there are over 8,000 City managers and at most, respondents have shown only that three persons at one agency, and one person at another agency, none of whom are parties to this action, possibly received disciplinary sanctions inconsistent with the salary basis test in the four years between the beginning of the limitations period in this action and respondents' summary judgment motion (JA 50d, 516).[1] We believe it absolutely irrational for respondents herein to receive over 14

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[1] Respondent Vito LaBella was demoted for two weeks, which caused him to lose $258 in salary, but DOL has said in the Federal Register that demotions are permissible penalties (JA 301, 527, 783, 1156-60). 57 FR 37674. Respondent Harold Yourman was fined $6.25 but this sum was reimbursed in the next pay period and thus would come under the "window of correction" of 29 CFR section 541.118(a)(6) that is in issue in Auer (JA 528-29, 548). Respondent Theodore DiGilio was suspended for nine days but then, pursuant to a settlement, was reimbursed for the nine days that he did not work and agreed to forfeit four vacation days; thus, he also comes within the "window of correction" (JA 528-29, 591).

Disciplinary sanctions imposed on managers who are not respondents are irrelevant because a Rule 23 class action is not available under the Fair Labor Standards Act ("FLSA"); employees must "opt in" or they will not benefit from the judgment. 29 USC section 216(a); LaChappelle v. Owens-Illinois, Inc., 513 F2d 286, 288 (5th Cir, 1975). In any event, even considering managers who were not parties to this lawsuit, cryptic documents in the record, about which there was no testimony, seem to indicate that three managers at the Fire Department were fined five or ten days' pay (JA 244-46). In addition, one employee of the Department of Housing Preservation and Development, Marvin Wilkinson, was fined twice for failing to file a financial disclosure form (JA 250). Pages 239 and 456 of the Joint Appendix, cited by respondents (RBO at 12 n.11), do not contain evidence of disciplinary sanctions violative of the salary basis test.

million dollars[2] for work already performed, when they always understood that they were to work as many hours as necessary to discharge their responsibilities and their salaries were set on that basis, because of these five fines.

RESPONDENTS THEMSELVES HAVE DEMONSTRATED THAT WHETHER 29 CFR SECTION 541.118 IS A REGULATION OR INTERPRETATION IS AN ISSUE WORTHY OF REVIEW BY THIS COURT.

Respondents argue that under Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 843-44 (1984), the salary basis test must be upheld unless this Court finds it arbitrary and capricious or contrary to the intent of Congress (RBO at 21). Inasmuch as the test is arbitrary and capricious and contrary to the intent of Congress, the degree of deference to which the statute is entitled is irrelevant. If, however, the degree of deference becomes relevant, an issue worthy of review would be presented: whether the salary basis test is a regulation deserving Chevron deference or merely an interpretation, which would be entitled to deference only to the extent that it is persuasive, see Skidmore v. Swift & Co., 323 US 134,

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[2] Respondents quibble over the amount of the judgment (RBO at 7 n.9). The judgment is for $13,306,923.86 with post-judgment interest from May 5, 1995; this amount certainly is over $14 million by now (A 34). Respondents also were awarded $560,000 in attorneys' fees for services performed through August 30, 1995, which does not include any appellate work (JA 1828). Respondents were awarded time and one-half pay for their hours in excess of forty in any week and were awarded liquidated damages of double damages, so that they will in effect be paid at three times their hourly rate for hours in excess of forty, although they will receive no pre-judgment interest (RBO at 7 n.9). 29 USC section 216(b). More significantly, petitioners face five other similar cases with potential exposure of 20 to 25 million dollars in addition to the judgment and attorneys' fees award herein (Petition at 17).

139-40 (1944); Freeman v. National Broadcasting Company, Inc., 80 F3d 78, 83-84 (2d Cir, 1996) (Petition at 25-26). Congress did not instruct DOL to set the minimum wage, determine how many hours could be worked per week before overtime pay would be required, set the rate of overtime, or determine who would be exempt from the FLSA, but merely to define and delimit the managerial exemption. 29 USC section 213(a)(1).

CERTIORARI SHOULD BE GRANTED IN ORDER TO DETERMINE WHETHER THE FACTS OF THIS CASE CONSTITUTE A DEFECT IN THE POLITICAL PROCESS LEADING TO AN INTRUSION ON THE AFFAIRS OF STATE AND LOCAL GOVERNMENTS PROHIBITED BY THE TENTH AMENDMENT.

Respondents reveal a complete failure to understand the issues both under the tenth amendment, and on the question of the deference to be accorded the salary basis test, in stating that when petitioners revised their policies to conform to the salary basis test after the District Court ruled on liability, petitioners "obeyed the law" (RBO at 27). But DOL was not authorized by Congress to lay down the law of the terms of the employment contracts between State and local governments and their managerial employees. DOL merely was authorized to define and delimit the phrase "bona fide executive, administrative or professional capacity," i.e., to come up with a test that one could hold up against the employment policies at issue to determine whether the position at issue was a "bona fide executive, administrative or professional" position. In practice, however, because of the public accountability and progressive discipline

principles, DOL has denied the managerial exemption to the States.[3]

There is no question that the principal purpose of the FLSA was to prohibit substandard labor conditions. Barrentine v. Arkansas-Best Freight Systems, 450 US 728, 739 (1981); Freeman v. National Broadcasting Company, Inc., supra, 80 F3d at 86. The statute, enacted during the Great Depression, itself states that its purpose was to address "labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general well-being of workers." 29 USC section 202(a); see Brooklyn Savings Bank v. O'Neil, 324 US 697, 707 n.18 (1944) (Congress intended the FLSA "to aid the unprotected, unorganized and lowest paid of the nation's working population; that is, those employees who lacked sufficient bargaining power to secure for themselves a minimum subsistence wage."). Notably, the reason that the FLSA provides for liquidated damages of twice the backpay owed (which respondents were awarded) is that Congress recognized that the "failure to pay the statutory minimum on time may be so detrimental to maintenance of the minimum standard of living 'necessary for health, efficiency and general well-being of workers' ... that double payments must be made ... in order to insure restoration of the worker to

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[3] We note that this Court recently held that the interstate commerce clause is not sufficient authority for Congress to abrogate the States' eleventh amendment immunity from suit in federal court, relying principally on the fact that the eleventh amendment postdated the interstate commerce clause. Seminole Tribe v. Florida, ___ US ___, 116 S Ct 1114 (1996). Similarly here, the tenth amendment postdated the interstate commerce clause and we submit that in light of Seminole Tribe, and because the salary basis test interferes with the employment relationship between the States and their highest-level employees, DOL's failure to amend the salary basis test when DOL has admitted for years that it needs revision, constitutes a defect in the national political process that rises to the level of a tenth amendment violation.

that minimum standard of well-being." Brooklyn Savings Bank v. O'Neil, supra, 324 US at 707 (quoting 29 USC section 202(a)) (footnote omitted).

Here, respondents, each and every one a well-paid manager, seek to use the FLSA not as a shield against substandard living conditions but as a sword to recover a windfall that no one ever thought was part of their agreed-upon compensation. We respectfully submit that recovery by respondents herein makes a mockery of the purposes of the FLSA and its humanitarian goals at the expense of the taxpayers of State and local governments large and small. This Court must grant the petition in order to address the serious legal issues raised by petitioners and declare invalid the salary basis test. Such a declaration would leave intact the "duties test," 29 CFR sections 541.1 and 541.2 (Petition at 5-7), for determining whether an employee is within the managerial exemption (and which respondents unquestionably satisfy).

Respectfully submitted,

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